

ORIGINAL

REDACTED – FOR PUBLIC INSPECTION

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Federal Communications Commission
Office of the Secretary

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October 26, 2007

EX PARTE PRESENTATION

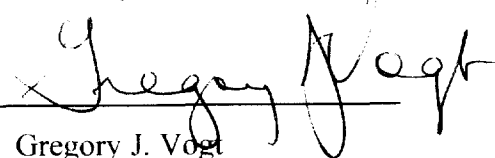
Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in CC Docket No. 96-45, Application of Choice Communications, Inc. for Eligible Telecommunications Status in the U.S. Virgin Islands

Dear Ms. Dortch:

Innovative Telephone hereby submits an ex parte submission pursuant to Section 1.1206(b) of the Commission's rules. The attached document is the public, redacted version of a document that contains highly confidential information, subject to the protective order entered in CC Docket No. 96-45, DA 07-3978, before the FCC.

Sincerely,



Gregory J. Vogt
Counsel for Innovative Telephone

Enclosures

cc: Jennifer McKee
Robert Aamoth
Jennifer Kashatus

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Re: Ex Parte Presentation in CC Docket No. 96-45, Application of Choice Communications, Inc. for Eligible Telecommunications Status in the U.S. Virgin Islands

Dear Ms. Dortch:

Choice Communications (“Petitioner”) does not qualify as an eligible telecommunications carrier pursuant to the terms of the Communications Act and thus its petition should be denied. In January 2005, Petitioner requested ETC status based on the claim that it was a telecommunications carrier in the U.S. Virgin Islands.¹ Both Innovative Telephone and Verizon opposed this petition because it failed to meet Section 214’s public interest standards. In addition, Innovative Telephone submitted evidence that petitioner was not actually providing any telecommunications services in the U.S. Virgin Islands despite the fact that it held licenses that obligated it to provide such services.² Petitioner has never provided evidence to contradict this finding, although it now states in a letter signed by its lawyer that it has reconfigured its SMR system to permit outgoing voice calls.³ But no where does it specifically attest to the truth of this specific statement, indicate

¹ Choice Communications LLC Petition for Designation as Eligible Telecommunications Carrier, CC Docket No. 96-45 (filed Jan. 13, 2005).

² Contrary to the claim made in its petition, Innovative Telephone submitted an affidavit from a person who attempted to subscribe to Petitioner’s SMR service and the company said that it did not provide the service. See Declaration of Donald Parrish, Appendix A, Opposition of the Virgin Islands Telephone Company, d/b/a Innovative Telephone, CC Docket No. 86-45 (Feb. 23, 2005, 2005).

³ Letter from Robert J. Aamoth to FCC Secretary, at 5 (Sept. 27, 2005).

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October 26, 2007

whether customers actually use or know about the capability, nor indeed what the coverage of the service is or whether there are any customers at all for this SMR dispatch service.

When petitioner's deception was originally disclosed, it slipped out from under the claim, and instead claimed that it was going to become a telecommunications carrier in the future.⁴ Although two years have passed since it filed its petition, Petitioner has come no closer to fulfilling its promise of providing telecommunications service to U.S. Virgin Islanders. For instance, the Virgin Islands Public Services Commission ("VIPSC") arbitrated an interconnection agreement at Petitioner's request in 2001, and Innovative Telephone agreed to sign it. Not only has Petitioner refused to ever sign that agreement in the five ensuing years, it has continuously challenged the PSC's decision in court, claiming that it could not provide service to the U.S. Virgin Islands pursuant to that contract.⁵ This is despite the fact that many telecommunications carriers have negotiated and signed agreements for interconnection in the U.S. Virgin Islands without the need to resort to arbitration or court challenge.⁶

After two years have passed since it filed its ETC application, Petitioner again changes the story it is telling the FCC. It now once again claims that it is operating as a telecommunications carrier, vaguely alluding to some unspecified services it claims qualifies it to obtain ETC status. Except for a citation to "special-access type service", nowhere in Petitioner's September 24, 2007 ex parte does it describe these additional services, so we and the FCC are left to speculate as to the coverage of the services or whether there are any customers at all. Is Petitioner relying on the SMR service that Innovative Telephone proved it was not actually providing?⁷ Is it

⁴ Reply Comments of Choice Communications LLC, CC Docket No. 96-45, at 10 (filed Mar. 9, 2005)("Choice Reply").

⁵ The agreement is in fact more favorable to petitioner than are the five other agreements that Innovative Telephone has voluntarily entered into with telecommunications carriers in the U.S. Virgin Islands.

⁶ Petitioner's unsupported claim that there is no competition in the U.S. Virgin Islands is a wild canard. There are multiple voice and data communications companies operating in the U.S. Virgin Islands serving thousands of customers. Its claim that it cannot enter the voice market itself absent USF money ignores the fact that numerous competitors use resale to enter telecommunications markets on the mainland through a variety of technologies.

⁷ This SMR service is surprisingly still listed on its web site but now the web site states that the service is targeted solely to the "construction, park services, shipping, delivery or security fields," which provides services between "a mobile hand set and a base station." See Appendix A. This is not the kind of

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referring to its paging services?⁸ Is it referring to the one point-to-point microwave facility that it is providing point-to-point microwave service to a small island in the U.S. Virgin Islands to one consumer? Is it referring to is Internet Service Provider business that it offers over dial up lines that its customers purchase form Innovative Telephone? Is it trying to get USF from a customer using VoIP?⁹

The one specific service it claims makes it eligible for USF is called in its letter a “transport service” that is like special access.¹⁰ No where does petitioner identify the functionality or technology used to provide such service, but it simply asserts that “voice service can be obtained”. It does not describe how or under what circumstances it provides a service that it must be referring to. In fact, petitioner does not market this service as a common carrier transport service, but rather describes the service in its marketing materials as “wireless internet” or “wDSL”.¹¹ It does make the bizarre claim that such wireless information service is “like” special access service. It then breaks into a *Computer II*-inspired song and dance about the fact that this information service should be viewed as also providing a separate telecommunications service.

We do not know where petitioner has been, but the FCC has long ago repudiated the two separate services theory behind the provision of DSL and eliminated its *Computer II* requirement that facilities-based carriers be deemed to be offering a basic telecommunications service as part of its information service offering. In

interconnected service that the FCC has found to be a qualified telecommunications service in the past.

⁸ Of course, carriers cannot prove their entitlement to be an ETC based on paging services, since those services do not provide the core functionalities identified by the FCC as eligible for USF support. 47 U.S.C. § 54.101(a).

⁹ Of course, the FCC has not yet ruled whether VoIP services are telecommunications services and thus are currently ineligible to be used to justify an ETC application. It should be noted that on Petitioner’s web site, it clearly states that its wDSL offerings do not fully support VoIP, and VoIP services are in fact unavailable to many customers. It refers to VoIP services as “future” offerings, with no predicted availability date. *See* Appendix B.

¹⁰ Originally in its Reply, Petitioner described this “transport service” as one that would in the future provide fixed wireless voice services using telephone handsets. Choice Reply at 10-11. After two years have passed, Petitioner does not state whether it has ever deployed this description of the service, whether there are any customers who place voice telephone calls over the service, or whether it now plans some other type of service over those facilities.

¹¹ *See* Appendix C.

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2005, the FCC concluded that public policy did not require that facilities-based common carriers be required to forcibly treat DSL as continuing both and information and basic telecommunications service.¹² It thus allowed all carriers to eliminate the regulated telecommunications service component of the service. It has never found that a carrier could now claim to separate a basic service from its information service offering at its own choosing, let alone to do it solely to support an ETC application. It has never mandated that a wireless carrier providing an information service be artificially separated into a separate telecommunications pipe.¹³

Of course, Petitioner never argues that the FCC has applied *Computer II* to it and has not explained how it has effectuated such separation in the marketplace or from a regulatory standpoint. In fact, Petitioner does not even offer to consumers a separable “telecommunications service” associated with its wireless Internet offering. Petitioner has provided no contract where it provides such service. It has not identified any place on its web site or in a tariff where it offers such telecommunications service. On the contrary, this fictional “telecommunications service” is simply a figment of petitioner’s imagination and it in fact offers its “transport service” as a broadband internet offering.¹⁴ As such, this argument is a

¹² *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, 20 FCC Rcd 14853, ¶1 (2005).

¹³ Oddly, Petitioner cites the *Wireless Broadband Order* for the proposition that if a wireless carrier does not offer Internet access with its service that it must be treated as offering a separate service. See *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, 22 FCC Rcd 5901 (rel. Mar. 23, 2007) (“*Wireless Broadband Order*”). Nowhere in the *Wireless Broadband Order* did the FCC ever conclude or mandate that a wireless carrier offering Internet access be viewed as offering a regulated telecommunications service. In fact, the Order concluded exactly the opposite, that wireless broadband service is an unregulated service offering without a separate telecommunications service component. *Id.* at ¶ 30-32. Although the FCC said that a wholesale provider of wireless broadband could choose to offer a separate telecommunications service, *Id.* at ¶ 1, such provider would be fully subject to the Title II regulatory scheme if it did so. Petitioner never indicates it is acting as a wholesaler and therefore this order is unhelpful to its endeavor.

¹⁴ Of course, the fact that one or a few customers use the service without connecting to the Internet is irrelevant to this analysis. It should be noted, however, Choice’s claim to have an unspecified small number of customers that

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make-weight that it is using in a desperate search for USF money. And, of course, the FCC cannot grant an ETC application based on the provision of an information service since that service is not currently supported under the FCC rules.¹⁵

Petitioner has also made no attempt to meet the FCC's minimum criteria that were established to evaluate whether a telecommunications carrier qualifies for ETC status in a rural telephone company area, such as the one involved here.¹⁶ In that Order, the FCC required that (1) petitioner demonstrate a commitment and ability to deliver covered services; (2) needed to prove that it would meet consumer protection and emergency communications, and lifeline requirements; (3) demonstrate a financial ability and business plan to deliver covered services throughout the covered territory; and (4) demonstrate through a cost/benefit analysis that the public interest would be served and that the carrier would avoid unfair creamskimming of rural telephone company customers. Petitioner has not provided a five year business plan or even identified a price for its alleged service. It has not shown why its service is conducive to the public interest or will avoid anticompetitive creamskimming, but included only bare allegations that the public service would be served. It has not even attempted to show an engineering plan that would fulfill its empty promises.¹⁷

do not connect to the Internet is not the kind of evidence and support that the FCC has demanded of an ETC applicant.

¹⁵ Although the FCC and the Federal-State Joint Board on Universal Service are currently examining whether to support broadband services under the universal service rules, the FCC can only grant ETC status based on Section 214 of the Act, which is limited to the provision of telecommunications services, and should do so only after rules are adopted and a new application is filed based on those new rules.

¹⁶ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 20 FCC Rcd 6371 (rel. Mar. 17, 2005) Although Petitioner filed its application less than a month after the adoption of the FCC's ETC rural criteria, Petitioner has had plenty of time to make the showing required and it has refused to do so. Innovative Telephone submits that Petitioner should be required to do so given the elusive and shifting claims in its pleadings.

¹⁷ Indeed the coverage maps Petitioner submitted pursuant to a confidentiality showing demonstrates that it does not cover [redacted] the islands' territory, limiting itself to [redacted] areas in Innovative Telephone's rural territory. Petitioner does not even include an estimate of the population that its services covers or the numbers of customers currently served that can obtain services supported by USF. Although it claimed it would cover through resale the remainder of the islands it cannot reach through wireless signals, it has not even executed the resale agreement that Innovative Telephone made available to it

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Although the FCC has indicated that a telecommunications carrier does not have to show that it can provide ubiquitous service or every single service contained in §54.101(a) prior to receiving its ETC grant, that precedent involved companies that were already providing substantial voice services, but simply had not yet provided a limited number of covered services or had not yet shown its ability to cover all service areas.¹⁸ Petitioner has not even demonstrated that it provides *any* of the covered voice services. The mere promise to provide service is a far cry from showing a demonstrated ability to provide the covered services. Therefore, Petitioner does not even come close to meeting this precedent.

Petitioner's arguments are seriously flawed, distort the facts, and should be rejected. Section 214 of the Communications Act permits grant of a second ETC provider in a rural telephone company territory, such as Innovative Telephone's, only where it would serve the public interest. Petitioner has utterly failed in its application to demonstrate that it would meet that public interest standard because it does not provide the services that are supported and has done nothing to demonstrate that it will ever be capable of doing so. Given this utter failure, the FCC should not squander the scarce resources of the USF on a company that does not provide telecommunications services and has not demonstrated that it will even minimally comply with the FCC's rules for rural ETC status.¹⁹

five years ago or demonstrated what other service provider would provide it with resale. And, of course, the interconnection contract that would allow it to resell Innovative Telephone wireline service could not even be used to justify receipt of USF. Thus, petitioner fails to demonstrate that it is able to serve all of Innovative Telephone's territory as required by the statute.

¹⁸ *Federal-State Joint Board on Universal Service, Western Wireless Corporation, Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, 15 FCC Rcd 15168, ¶ 17 (2000).

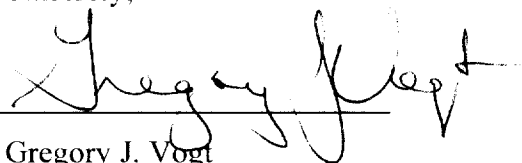
¹⁹ This is particularly the case since the FCC is proposing to freeze ETC payments to the amounts received in 2005, something for which petitioner cannot qualify.

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October 26, 2007

For all the foregoing reasons, the petition should be denied.

Sincerely,

A handwritten signature in black ink, appearing to read "Gregory J. Vogt", written over a horizontal line.

Gregory J. Vogt
Counsel for Innovative Telephone



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Please call tech support at (340) 719-9175 if you encounter any issues so we can get them resolved as quickly as possible.

The Choice Technical Team

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The Choice Technical Team

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Choice cannot guarantee that VoIP services offered by Internet Service Providers or VoIP service providers other than Choice will work on Choice's wDSL service. Choice's Terms of Service and Customer Agreement for its wDSL products and services explicitly reserves Choice's right in its sole discretion to discontinue or limit Choice wDSL service to customers that negatively impact throughput and overall system performance. Such impact may result from a customer's use of other VoIP offerings - especially those VoIP services using compression or coding schemes that have not been optimized for Choice wDSL service.

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Choice Communications can provide your home or business with Wireless Digital Subscriber Lines (wDSL) for accessing the Internet. This is also more commonly known as high speed Internet access. On St. Croix, you can receive the service by having a small antenna placed in the best location outside of your home/business, which receives a signal from a transmitting tower. This technology is based on line-of-sight (LOS) signal. On St. Thomas, in addition to LOS service, we can also provide NLOS (Near line-of-sight) service, known as ClearChoice, available in certain areas. For more information on ClearChoice, and how you can sign up for this technologically advanced service, please [click here!](#)

Telephone lines are not necessary to receive our Internet service, so you start saving immediately! In addition, our ClearChoice Internet service is self-installed so there is no need to make appointments or wait for installers. You just pick up your subscriber unit at our Haveright office, which acts as an antenna, plug it in to your computer, and start surfing the net! Our customers really feel that our wireless system is the best answer to their needs!

[Click here](#) to sign up for Choice Communication's Wireless Broadband Internet!

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Dear Choice Customers:

In order to alleviate the hosting issues, the technical team is currently moving the Choice Communications hosting accounts over to a new reliable server. Please note that the new server requires you to use your qualified username when configuring your FTP client. For example if you have an standard account then your qualified FTP username would be username@stjohns.vi. By the same rules if you have a viaccess.net account your FTP username would be username@viaccess.net.

Please call tech support at (340) 719-9175 if you encounter any issues so we can get them resolved as quickly as possible.

The Choice Technical Team

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